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The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Greenebaum and Rose Associates

File: B-227807

Date: August 31, 1987

DIGEST

While procuring agencies have broad discretion in determining the evaluation plan they will use in a negotiated procurement, they do not have the discretion to announce in the solicitation that one plan will be used and then follow another in the actual evaluation. General Accounting Office finds that the procuring agency terminated negotiations with an offeror and, in effect, rejected its proposal on the basis of criteria not specified by the solicitation, and, under the circumstances, finds the protester entitled to proposal preparation costs and the costs of protesting.

DECISION

Greenebaum and Rose Associates protests the determination by the General Services Administration (GSA) to discontinue negotiations with Greenebaum for the purchase of a building (designated as Union Center Plaza, Washington, D.C.) for use by the Internal Revenue Service pursuant to solicitation for offers (SFO) No. 86-070. Although Greenebaum was determined to be a successful offeror under the terms of the SFO, GSA terminated negotiations with the firm because the Office of Management and Budget (OMB) disapproved the proposed purchase.

We sustain the protest.

The SFO was issued on July 17, 1986 for the acquisition of one or more groups of first class office buildings by direct purchase or by lease with options to purchase.^{1/} Under the SFO, offerors were required to demonstrate their ability to deliver an initial building with a minimum of 110,000 square

^{1/} The first page of the SFO thanked prospective offerors for their interest in GSA's "Building Purchase Program." However, the program was not further explained in the SFO which invited offers based on the specific terms and evaluation criteria of the SFO.

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feet, and provide subsequent buildings in the same project or office park to permit the acquisition of a total of 450,000 to 1,000,000 square feet. The SFO stated that award would be made upon the terms and conditions which meet all the government's requirements and are most advantageous to the government. The SFO stated that proposals would be initially evaluated to determine if they met the government's minimum requirements. The SFO also stated that further evaluation would be based upon technical rating and price. In descending order of importance, the SFO listed the following technical evaluation criteria:

- 1) proximity to Metro (subway) station
- 2) newer buildings will be given preference
- 3) general quality
- 4) layout efficiency/efficiency of building design

Further, the SFO stated that technical merit is "worth more" than price for the purposes of proposal evaluation. Finally, the SFO did not restrict offers to existing buildings, but stated the initial building must be completed and ready for tenants within 1 year.

Sixteen proposals were received by July 31, 1986, the closing date for receipt of initial proposals. After technical evaluation, four proposals, including Greenebaum's, were determined to be in the competitive range. Greenebaum offered a building that was to be constructed in the future; therefore, its proposal consisted of plans, designs and specifications for its new proposed building on the site that it owned near Union Station, Washington, D.C. (construction of Greenebaum's building commenced in December 1986 after groundbreaking in the summer of 1986). Extensive and detailed negotiations continued between the contracting officer and Greenebaum during the fall and winter of 1986. GSA advised Greenebaum during this time of numerous "deficiencies" in its proposal. As a result, Greenebaum made numerous and costly architectural, structural, mechanical, and electrical changes in its designs, plans, and drawings for its building to satisfy GSA's concerns. Also during these negotiations, GSA generally advised the firm that several approvals would have to be obtained, including approval from OMB, before a contract could be awarded to the firm.

On December 9, 1986, GSA received Greenebaum's best and final offer (BAFO) which specifically stated that "the price includes all SFO requirements and retrofit items submitted to us as a result of GSA's inspections." After evaluating BAFOs, the contracting officer contacted Greenebaum and advised the firm that GSA was interested in preparing a formal contract to purchase the property dependent upon

obtaining approvals; a final contract was given to Greenebaum which it executed and returned to GSA for its execution. GSA then submitted a recommendation to OMB to purchase the property. OMB ultimately replied as follows:

"After carefully analyzing the information provided and reviewing the intended purpose of the opportunity purchase program, OMB does not support the proposed purchase and lease of the East Union Center Plaza.^{2/} The opportunity purchase program was created to allow GSA to act quickly to acquire existing properties at significant savings over constructing facilities. Further, to allow GSA to move quickly, the opportunity purchase program does not require GSA to seek the prior approval of Congress to acquire the building.

"It is our view that the Union Center Plaza proposal does not offer the government an opportunity to achieve significant savings over constructing an equivalent building. Further, the Union Center type of development (i.e. planned and not existing) does not require GSA to act quickly without Congressional approval. Therefore, it is our position that the Union Center Plaza is not an acceptable opportunity purchase within the definition of the program." (Emphasis in original.)

GSA thereupon discontinued negotiations with Greenebaum. GSA states that OMB's disapproval was not based on lack of statutory authority within GSA to purchase Greenebaum's building but was rather based on a policy decision that the "opportunity purchase program" should not be used to purchase buildings which do not achieve significant savings over construction of equivalent buildings. GSA did receive approval from OMB to proceed with an award for another building project under this RFP.

Greenebaum argues that GSA, by adopting OMB's "policy" decision and terminating negotiations, followed previously unannounced criteria to deprive the firm of the award: 1) that the building be "existing"; 2) that GSA be able to purchase it "quickly"; and 3) that the purchase price reflect "significant savings over constructing facilities." Greenebaum also argues, and we find, that nowhere in the solicitation are such evaluation factors mentioned.

^{2/} The "opportunity purchase program" is apparently another name for GSA's "building purchase program."

According to Greenebaum, these unannounced criteria were imposed: 1) after Greenebaum had incurred substantial costs in preparing a response to the SFO, the explicit requirements of which it could and did satisfy; 2) after Greenebaum had undertaken substantial redesign of the building to meet the unique needs of GSA and its prospective tenant, the Internal Revenue Service; and 3) after Greenebaum had spent time and incurred substantial legal fees in negotiating the contract. Greenebaum concludes that it has been unfairly treated and requests that GSA be required to negotiate a contract with the firm or, alternatively, that it be reimbursed for its proposal preparation and protest costs.

While procuring agencies have broad discretion in determining the evaluation plan they will use, we think it is fundamental that they do not have the discretion to announce in the solicitation that one plan will be used and then follow another in the actual evaluation. Umpqua Research Co., B-199014, Apr. 3, 1981, 81-1 CPD ¶ 254. Once offerors are informed of the criteria against which their proposals will be evaluated, the agency must adhere to those criteria or inform all offerors of any significant changes made in the evaluation scheme. Telecommunications Management Corp., 57 Comp. Gen. 251 (1978), 78-1 CPD ¶ 80; Eastman Kodak Co., B-194584, Aug. 9, 1979, 79-2 CPD ¶ 105. Here, Greenebaum, in good faith and in reliance on the express terms of the solicitation, submitted a proposal which complied with the SFO. Nevertheless, its proposal was rejected after months of negotiations because it did not qualify under the "opportunity purchase program."

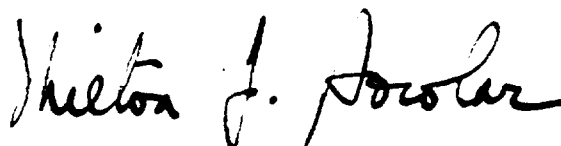
The opportunity purchase program is primarily reflected in a written GSA order dated September 19, 1984. The order states that the program was developed to "provide a method of quickly acquiring fee simple interest in real property"; the program provides funds "to purchase buildings and the underlying land if . . . it is economically advantageous . . . to own and manage it as opposed to other alternatives."

While we have no basis to disagree with OMB's interpretation of the program, the protester is clearly correct in stating that the solicitation did not include any mention of offerors having to comply with the opportunity purchase program. Moreover, while GSA advised the firm during negotiations that several approvals would have to be obtained, including approval from OMB, before a contract could be awarded to the firm, GSA never advised Greenebaum that unannounced criteria, contrary to the express terms of the solicitation, would be the basis for approval or disapproval by OMB. Accordingly we sustain the protest on this basis.

Ordinarily, in similar circumstances we would recommend that the solicitation be amended to reflect the agency's actual needs and evaluation criteria and to allow vendors to compete on the basis of those needs and criteria. Such a recommendation is not feasible here since Greenebaum's proposed building is not acceptable under the opportunity purchase program.

We find, therefore, that the protester is entitled to protest and proposal preparation costs. The reasonable costs of filing and pursuing a protest, including attorney's fees, may be recovered where the agency has unreasonably excluded the protester from the procurement, except where our Office recommends that the contract be awarded to the protester and the protester receives the award. 4 C.F.R. § 21.6(e) (1987). Additionally, the recovery of costs for proposal preparation may be allowed where the protester was unreasonably excluded from the competition and no other practicable remedy is available. Id.; Consolidated Construction, Inc., B-219107.2, Nov. 7, 1985, 85-2 CPD ¶ 529. Here, we think that the contracting officer knew or should have known of the opportunity purchase program and its limits. Greenebaum was induced to submit a proposal under a solicitation that was silent as to material terms that mandated Greenebaum's rejection. In short, the contracting officer led this offeror through a negotiation process that the offeror had no chance of winning. Since unannounced criteria were used by the agency to deprive the firm of the contract, we think that the firm was unreasonably excluded under the terms of the solicitation and unreasonably included under the terms of the opportunity purchase program. Accordingly, by separate letter of today, we are advising the Administrator of GSA of our determination that Greenebaum be allowed to recover its costs of filing and pursuing its protest, including attorney's fees, and also its proposal preparation costs. Greenebaum should submit its claim for such costs directly to GSA. 4 C.F.R. § 21.6(f).

The protest is sustained.

for 
Comptroller General
of the United States